United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1873

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P/S

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee

v.

PETER MARROCCO,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

DAVID G. TRAGER,
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Eastern District of New York.

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ISSUE PRESENTED

Whether appellant's confession was properly received into evidence.

STATEMENT

After a joint trial with one Frank Cardia before a jury in the United States District Court for the Eastern District of New York, petitioner was convicted of having distributed heroin (counts three, four, and five) and of having conspired with Cardia and others[1/]

1/Also charged as defendants in the conspiracy count, as well as in various substantive counts, were Charles Siena and Grace Cassese. Nicholas Marchese was named as an unindicted co-conspirator.

Siena pleaded guilty to the conspiracy count.

The charges against Cassese were dismissed on the government's motion.

Co-defendant Cardia was acquitted.

to distribute heroin and possess heroin with intent to distribute (count one), in violation of 21 U.S.C. 841(a)(1). Petitioner received concurrent sentences of five years' imprisonment to be followed by five years' special parole.

At trial the evidence showed that on July 4, 1973, Nicholas Marchese,[2/] an informant for the Drug Enforcement Administration (D.E.A.), encountered co-defendant Cardia in a Brooklyn gas station and told him that he wanted to buy heroin. Cardia took Marchese's telephone number and said that someone would call (Tr. 22-25). A few days later appellant telephoned Marchese and said that he had one-quarter ounce of heroin to sell (Tr. 26-27).

Appellant arranged to meet Marchese at 6 p.m. on July 27, 1973, at Wilson Avenue and Trautman Street in Brooklyn. On July 27, after federal agents searched Marchese and his car for heroin with negative results, Marchese drove to the appointed intersection with Dorothy Lombardo, his girl friend, and Daniel Martin, a federal undercover agent. The informant left his car and walked across the street where he met appellant. Marchese told appellant that he had brought his partner Danny with him. When appellant saw Agent Martin, he expressed misgivings about dealing with him. However, Marchese assured appellant that Martin was "all right." As other federal agents who were maintaining surveillance in unmarked vehicles looked on, appellant took from his pocket a foil-wrapped package containing

2/Marchese testified for the government at trial.

one-quarter ounce of heroin and handed it to Marchese. Marchese crossed the street to his car and gave the heroin to Agent Martin. Martin got out of the car and talked with appellant. As they talked, Martin put $375 in appellant's shirt pocket. Appellant said that the price was only $350 and handed back $25 (Tr. 27-33, 89-92, 134-137).

Appellant telephoned Marchese on August 2, 1973, and said that he wanted to see him. The two met later that day at Evergreen Avenue and Jefferson Street in Brooklyn. Appellant told Marchese that Charles Siena had told Cardia that Agent Martin was a cop. Marchese told appellant "don't be stupid" and again assured him that Martin could be trusted (Tr. 33-35).

The next day appellant telephoned Marchese and told him that he had one-half ounce of heroin to sell for $700. Marchese said that he would check with his partner and asked appellant to call back in a few days.

Appellant telephoned Marchese on August 6, 1973, and at his suggestion, they agreed to meet that evening at Dekalb and Wyckoff Avenues in Brooklyn (Tr. 35-36). After agents searched Marchese and his car, the informant, again accompanied by Agent Martin and Miss Lombardo, drove to the intersection. About five minutes later appellant drove up in his car and parked around the corner. Marchese walked over and got into appellant's car. Appellant was angry because Marchese had brought Agent Martin again. He told the informant: "Look, if you bring that guy, don't bother seeing me. Leave him a few blocks away." Merchese went to his car and got $700 from Agent

Martin. He got into appellant's car, and they drove off followed by agents in an unmarked vehicle. Appellant dropped Marchese off at Wilson Avenue and Trautman Street. With agents continuing to maintain surveillance, appellant drove to 235 Trautman and went into a house. He soon emerged and drove back to Wilson and Trautman where he picked up Marchese. Appellant handed Marchese two one-quarter ounce packages of heroin and the informant gave him the $700. After appellant let Marchese off, the informant gave Agent Martin the heroin he had just received (Tr. 36-41, 98-102, 160-162).

Appellant telephoned Marchese on August 22, 1973, and told him that he had one ounce of heroin to sell for $1,400. He instructed the informant to meet him at Dekalb and Wyckoff that evening. After agents searched Marchese and his car, the informant drove to the intersection with Agent Martin and Miss Lombardo. Appellant and Cardia soon arrived, and Marchese conversed with them a short distance from his car. Appellant expressed annoyance at Agent Martin's presence, and Marchese again said that Martin was reliable. Marchese went to his car and got $1,400 from Agent Martin. He, appellant, and Cardia walked around the corner and got into Cardia's car. With Cardia driving, they proceeded to Wilson Avenue and Trautman Street. Marchese gave appellant the $1,400 and was let off at the corner. With agents following, Cardia and appellant drove to 235 Trautman where appellant got out and went into the same house as on August 6. Appellant came out again shortly and drove off in his own car, which had been parked on the street. Appellant, still followed by the surveillance unit,

picked up Marchese at Wilson and Trautman and handed him four one-quarter ounce packages of heroin. After appellant dropped off Marchese at Dekalb and Wyckoff, the informant gave Agent Martin the heroin (Tr. 41-48, 103-106, 137-140).

ARGUMENT

APPELLANT'S CONFESSION WAS PROPERLY RECEIVED INTO EVIDENCE

Federal agents arrested appellant at his Brooklyn apartment on September 21, 1973, and took him to a D.E.A. office in Westbury, New York. At the office Agent Martin read aloud to appellant a printed form advising him of his rights. When the agent asked appellant whether he understood those rights, he answered "yes" (Tr. 108-109, 113-115, 117, 119).

Agent Martin asked appellant whether he wanted to talk about the case. Appellant replied that he was worried. Martin advised him that the best thing he could do was to cooperate with law enforcement authorities. The agent asked appellant about the heroin he had sold on August 6 and 22, but appellant did not answer responsively. Instead, he and the agent discussed general topics for several minutes. Between five and ten minutes after he was advised of his rights, appellant indicated his willingness to cooperate and admitted to Martin and another agent that he had sold the heroin on August 6 and 22. At no time during the interview did appellant tell the agents that he did not wish to speak with them (Tr. 117-122, 127).

At trial, after Agent Martin testified outside the presence of the jury regarding the circumstances surrounding appellant's confession, the district judge ruled that the statement was voluntary (Tr. 123), and Martin was permitted to testify concerning it (Tr. 127).

On voir dire defense counsel cross-examined Agent Martin as follows concerning appellant's response when the agent first asked him about the heroin he had sold on August 6 and 22, 1973 (Tr. 120):

> Q. What did he say?
> A. He was still a little -- he didn't want to answer, really.
> Q. Did he say "I'm not talking?"
> A. No.
> Q. How did you know he didn't want to answer?
> A. That's my impression.

Appellant contends that in light of that testimony the district court's finding that he confessed voluntarily is clearly erroneous.

In Miranda v. United States, 384 U.S. 436 (1966), the Supreme Court stated (384 U.S. at 473-474):

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.*** If the individual states that he wants an attorney, the interrogation must cease until an attorney is present....

Miranda has been interpreted as requiring that "interrogation must cease, in whole or in part, in accordance with the expressed wishes of the suspect" [emphasis added]. United States v. Crisp, 435 F.2d 354, 357 (7th Cir. 1970), certiorari denied, 402 U.S. 947 (1971). A suspect may express his wish for interrogation to cease either through

an explicit remark to that effect or by an action which unmistakably implies that desire, such as remaining completely mute (see United States ex rel. Doss v. Bensinger, 463 F.2d 576, 577 (7th Cir. 1972), certiorari denied, 409 U.S. 932 (1972)) or referring questioners to his attorney (see Farley v. United States, 381 F.2d 357, 359 (5th Cir. 1967), certiorari denied, 389 U.S. 942 (1967)).

Here, appellant neither expressed any desire that the questioning end nor asked to see an attorney. His claim that he "demanded a halt to the questioning" (Br. 10) has no basis in the record. As Agent Martin testified, appellant never stated that he did not want to talk to the agents (Tr. 117). Appellant was understandably discomforted when Agent Martin asked him about his heroin sales, particularly since he had just discovered that his earlier fears were justified and that Martin was not a real narcotics dealer but an undercover agent who had personally witnessed some of his illicit activities. In those circumstances, appellant's demeanor naturally gave Agent Martin the "impression" that he "didn't want to answer, really." When appellant showed reluctance to talk about the heroin sales, the agent did not press him and, as detailed above, the two discussed general topics for several minutes. Later, but not more than ten minutes after the interview had begun, appellant expressed his desire to cooperate with the agents and made the confession at issue. At no time was appellant threatened or coerced in any manner, and the length of the interrogation was hardly unreasonable.

Even if appellant had stated that he did not wish to answer Agent Martin's question about the heroin sales on August 6 and 22, 1973, the agent could have properly questioned him about other matters, such as the July 27, 1973, heroin deal or have engaged him in the general discussion which in fact ensued. When an accused who understands his rights refuses to answer a specific question -- as opposed to requesting that all questioning cease -- officers may continue to interview him concerning other matters, and a subsequent confession in which the suspect spontaneously supplies the information sought by the earlier question is admissible. See United States v. Barnhill, 429 F.2d 340, 341-343 (8th Cir. 1970). See also Klinger v. United States, 409 F.2d 299, 307-308 (8th Cir. 1969), certiorari denied, 396 U.S. 859 (1969); United States v. Vasquez, 476 F.2d 730, 732-733 (5th Cir. 1973) certiorari denied, 414 U.S. 836 (1973).

Appellant apparently argues that even though he never expressed any desire that the interview cease, Agent Martin should have stopped it on his own initiative when he saw appellant's reaction to the question about the heroin sales on August 6 and 22, which the agent, perhaps infelicitously, described as giving him the "impression" that appellant "did not want to talk, really." However, if law enforcement officers had to cease interviewing an accused as soon as he is discomforted by a question which, in common parlance, he "would rather not answer," all interrogation would be rendered farcical. Clearly it is only an expressed desire by a suspect to remain silent or consult with an attorney that requires termination

of an interview. The cases relied on by appellant are not in point, since all involved defendants who indicated unequivocally that they wished to remain silent or see an attorney.

In any event, in view of the overwhelming evidence of petitioner's guilt, including the eyewitness testimony of the undercover agent and the informant, any error in connection with the confession is harmless beyond a reasonable doubt. F.R. Crim. P. 52(a); Chapman v. California, 386 U.S. 18 (1966).

CONCLUSION

It is therefore respectfully submitted that the judgment of conviction should be affirmed.

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SEPTEMBER 1974.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the Brief for Appellee have been mailed to William J. Gallagher, Esquire, The Legal Aid Society, Federal Defender Services Unit, 606 United States Court House, Foley Square, New York, New York 10007, counsel for appellant.

DATED: October 3, 1974

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